No. 02-246

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IN THE

Supreme Court of the United States

WALLACK MANAGEMENT CO., INC.;
625 PARK CORPORATION and IRA LEON RENNERT,

Petitioners,

v.

GOYA FOODS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

The Rule 29.6 Statement for the corporate petitioners was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that Statement.

Petitioners Ira Leon Rennert, Wallack Management Co., Inc. and 625 Park Corporation respectfully submit this Reply Brief in further support of their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case. Pursuant to Rule 15(6) of the Court, this Reply Brief addresses only new points raised in the Brief in Opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

POINTS ON REPLY

This Petition concerns the consequences of finding a nonparty in contempt of an order, when the effectiveness of the order was admittedly in serious doubt because of the failure of respondent to comply with the mandatory statutory conditions precedent requiring perfection in order for the Order to be effective. Respondent attempts to recast the issue raised in the Petition by erroneously asserting that petitioners are collaterally attacking the validity of the District Court's actions in issuing the Orders Prohibiting Alienation. In advancing this misleading characterization of the issue that was before the First Circuit and now before this Court, respondent raises four new points to support its view of the Petition. As discussed below, none of those issues alters the fact that the First Circuit's affirmance of the District Court's contempt finding constitutes a serious erosion of the stringent limits on a federal court's power to hold a nonparty in contempt.

In its Brief in Opposition, respondent raises four new issues, each of which is erroneous: (i) petitioners' actions were contemptuous because they frustrated respondent's ability to collect on any judgment (*see* Brief in Opposition at 20 n.6); (ii) due to the "idiosyncratic circumstances of

this case," it was impracticable or impossible to comply with Rule 56.4 of the Puerto Rico Rules (*see* Brief in Opposition at 4-5); (iii) based on certain deposition testimony, it is clear that the attorney who withdrew as counsel for Liliane Unanue in connection with the sale understood that the Orders Prohibiting Alienation were in effect (*see* Brief in Opposition at 7-8, 16-17); and (iv) petitioners contracted with Liliane Unanue to make the transaction secret in order to avoid contempt proceedings (*see* Brief in Opposition at 1).

First, respondent alternatively asserts that, even if petitioners' conduct did not constitute contempt because the Orders Prohibiting Alienation had lapsed, petitioners could nevertheless be found in contempt because they frustrated the Judgment. *See* Brief in Opposition at 20 n.6. Respondent is wrong because, to the extent that this doctrine still is in force today, the case law makes clear that this doctrine does not apply to a nonparty. Indeed, the decisions cited by respondent demonstrates this very point. For example, *Lamb v. Cramer*, 285 U.S. 217 (1932), involved the attorney who had appeared on behalf of the party. The attorney was an officer of the court, and represented the party with respect to both the litigation and the subject matter of the litigation. *Id.* at 218-19. Thus, he was subject to the court's contempt power by virtue of his status as an attorney. Further, all the subsequent authorities have limited *Lamb* to a precedent regarding the courts' power only over parties and attorneys who appear before them. *E.g.*, *Securities & Exchange Commission v. Comcoa Ltd.*, 887 F. Supp. 1521, 1527-28 (S.D. Fla.), *aff'd sub nom.*, *Levine v. Comcoa Ltd.*, 70 F.3d 1191 (11th Cir. 1995), *cert. denied*, 519 U.S. 809 (1996); *see* John E. Theuman, *Annotation: Attorney's Conduct as Contempt of Court – Supreme Court Cases*, 138 L. Ed. 2d 1151, § 8(a) (1999); J. P. Ludington, *Annotation: Attorney's*

Conduct as Contempt of Court – Federal Cases, 14 L. Ed. 2d 934, § 16 (1965).

Moreover, in *Amsellem v. HQZ West 56th Street Associates*, Nos. 86 Civ. 4451, 87 Civ. 1218, 1988 WL 142501 (S.D.N.Y. Dec. 30, 1988), the parties accused of contempt were the general partners of the partnership against which the judgment was directed and the alter ego and privy of the partnership against which the judgment had been rendered. *Id.* at *1. The conduct at issue was the partnership's sale of its property and the transfer of proceeds to its general partners, thereby rendering the partnership judgment proof. *Id.* at *2.[1]

Second, conceding that Rule 56.4 of the Puerto Rico Rules requires the physical seizure of the Cooperative Shares in order for the Orders Prohibiting Alienation to be effective post-judgment, respondent erroneously asserts that it should be excused from doing so here due to impracticability and/or impossibility. *See* Opposition Brief at 4-5. As a preliminary matter, respondent never offered any evidence at any stage of this proceeding to support such a proposition. Moreover, there was nothing impracticable or impossible. All respondent had to do was ask the district court to issue such an order. The record, in fact, objectively belies respondent's assertion, as the district court affirmatively required Liliane Unanue to deposit the Emperor Equities stock in the Amended Judgment. Respondent offers no explanation, let alone record

1. The other three decisions cited by respondent suffer from the same infirmity. *See Merrimack River Savings Bank v. City of Clay Center*, 219 U.S. 527, 535-36 (1911); *Savoie v. Merchants Bank*, 84 F.3d 52, 59 n.6 (2d Cir. 1996); *Griffin v. County School Board*, 363 F.2d 206, 210 (4th Cir.) (en banc), *cert. denied*, 385 U.S. 960 (1966).

support, why the same could not have occurred with respect to the Cooperative Shares. Further, impracticality is not a defense, as the statutory conditions are mandatory and are not waivable. *See* Petition at 26-28. Thus, given Goya's failure even to attempt to comply with Rule 56.4, respondent's excuse does not eliminate the substantial uncertainty that the First Circuit acknowledged at the outset of its decision.

Third, throughout its Opposition Brief, respondent relies upon deposition testimony knowingly obtained without appellants' participation. *See* Opposition Brief at 8-9, 16-17. Goya contends that this testimony was admissible, as it is the equivalent of an affidavit, but that assertion is wrong. Rule 32(a) of the Federal Rule of Civil Procedure permits a deposition to be used against a party on a motion only if that party was represented at the deposition or had reasonable notice of it. The conditions set forth in Rule 32(a) are mandatory. *See* 8A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure: Civil* § 2142, at 159 (3d ed. 1998). Consequently, "a deposition taken before a given party was added to the action may not be used against that party." *Id.* at 161. Because respondents disputed the fact supposedly evidenced by the deposition, the deposition testimony could not be used against them absent the right of cross-examination.

Fourth, respondent asserts that petitioners contracted to make the transaction secret to avoid contempt proceedings. *See* Brief in Opposition at 1. This proposition is unsupported by the record and can be afforded no weight. Further, it is absurd to assume, as respondent argues, that petitioners' indemnification agreement constitutes incontrovertible evidence that petitioners knew that their conduct was

prohibited. *See* Opposition Brief at 1. If this were true, petitioner Rennert would have knowingly agreed to pay double for the apartment. Indeed, if there was such a meaningful risk, consistent with the position that he expressed at the time, Mr. Rennert would have never purchased Apartment 10A. Finally, the so-called secrecy that accompanied the transaction has no bearing on the issue raised by this petition — the substantial uncertainty regarding the effectiveness of the Orders Prohibiting Alienation and the resulting bar to a finding of contempt against a nonparty.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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